FILE COPY

APR 6 194

CHARLES ELMORE CR

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 703

JOHN R. STINNETT,

Petitioner,

versus

THE UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOURTH CIRCUIT AND SUPPORTING BRIEF

GEO. E. ALLEN,
Mutual Building,
Richmond, Virginia,
Attorney for Petitioner.

INDEX TO PETITION

	Page
Summary statement of the matter involved	2
Federal jurisdiction	2
Questions presented	3
1. May the defendant be convicted of the felony of attempting to defeat and evade income taxes in violation of Section 145(b) of the Revenue Act upon evidence showing nothing more than deposits in bank which aggregate more than the gross receipts stated in his returns.	
2. Did the trial court err in charging the jury upon the assumption that the petitioner received income in excess of that declared, authorizing a conviction upon such an assumption without requiring proof beyond a reasonable doubt that the defendant had taxable income in excess of that declared, and without requiring any act of commission on the part of the defendant in attempting to defeat and evade income taxes.	
Reason relied on for allowance of the writ	3
Conclusion	4

INDEX TO BRIEF

Opinion of the court	5
Jurisdiction	8
Statement of the case	8
Argument	12
Point I	12
The conviction is based wholly upon the assumption, without proof, that petitioner's deposits in bank were derived from sales of merchandise and is, therefore, without evidence to support it.	
Point II	18
The charge assumes that petitioner received income in excess of that declared, and authorizes	

Page

a conviction upon such an assumption without requiring proof beyond a reasonable doubt that petitioner had taxable income in excess of that declared and without requiring any act of commission on the part of petitioner in attempting to defeat and evade income taxes.

Conclusion 23

TABLE OF CITATIONS

Barrow v. *United States*, 171 Fed. (2d) 286 18
Cane v. *United States*, 159 Fed. (2d) 464 16
Gary v. *Artist*, 43 S. E. (2d) 933 21
Gleckman v. *United States*, 80 F. (2d) 394, cert. den. 297 U. S. 709 6
Miles v. *United States*, 164 U. S. 644, 17 Sup. Ct. Reporter, 210 22
Nicola v. *United States*, 72 Fed. (2d) 780 (CA 3) 22
Spies v. *United States*, 317 U. S. 492, 63 Sup. Ct. Reporter 364 16
United States v. *Johnson*, 319 U. S. 503, 63 Sup. Ct. Reporter 1233 16
Section 145(b) of the Revenue Act of 1936, 49 Stat. 1648, 1703 (now Section 145(b) of the Internal Revenue Code, 26 U.S.C.A. Internal Revenue Code, Section 145(b).) 2, 8

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 703

JOHN R. STINNETT,

Petitioner,

versus

THE UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOURTH CIRCUIT AND SUPPORTING BRIEF

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, John R. Stinnett, respectfully prays for review on a writ of certiorari of the decision of the United States Court of Appeals, Fourth Circuit, involved in the judgment of said Court entered on the 9th day of March, 1949, in the appeal therein pending wherein your petitioner was appellant and the United States of America was respondent. This judgment affirmed a conviction in the

District Court of your petitioner of the felony of attempting to defeat and evade income taxes. Copies of the record printed below, together with the proceedings and opinion in the Court of Appeals, have been filed in accordance with the rules of this Court.

Summary Statement of the Matter Involved

Petitioner was the operator of a second-hand furniture business. Receipts from his gross sales, as stated in his returns covering the years under investigation, were less than his gross receipts computed by the Government upon the basis of his deposits in bank, assuming, without proof, that such deposits were receipts from the sale of merchandise. His conviction of the felony of attempting to defeat and evade income taxes in violation of Section 145(b) of the Revenue Act was based solely upon the difference between his gross receipts as shown by his returns and his gross receipts computed from bank deposits upon the assumption, without proof, that the deposits came from receipts from the sale of merchandise from his business.

The charge to the jury assumed that the petitioner received income in excess of that declared and authorized his conviction upon such an assumption without requiring proof beyond a reasonable doubt that the defendant had taxable income in excess of that declared and without requiring any act of commission on the part of the defendant in attempting to defeat and evade income taxes.

Federal Jurisdiction

The jurisdiction of this Court is founded upon Section 145(b) of the Revenue Act of 1936, 49 Stat. 1648, 1703, now Section 145(b) of the Internal Revenue Code, 26 U. S. C. A. Internal Revenue Code Section 145(b). The opinion of the Court of Appeals was filed March 9th, 1949.

Questions Presented

1. May the defendant be convicted of the felony of attempting to defeat and evade income taxes in violation of Section 145(b) of the Revenue Act upon evidence showing nothing more than deposits in bank which aggregate more than the gross receipts stated in his returns.

2. Did the trial court err in charging the jury upon the assumption that the petitioner received income in excess of that declared, authorizing a conviction upon such an assumption without requiring proof beyond a reasonable doubt that the defendant had taxable income in excess of that declared, and without requiring any act of commission on the part of the defendant in attempting to defeat and evade income taxes.

Reason Relied on for Allowance of the Writ

One reason for granting the writ is that the Court of Appeals, it is believed, has decided an important question of Federal law which has not been, but should be, settled by this Court, by holding that when it is shown that a defendant's deposits in bank over the period covered by his returns under investigation exceed his gross receipts, as stated in his returns, it may be assumed, without further proof, that the aggregate of his deposits constitute receipts from an income producing business and may be sufficient, standing alone, to support a conviction of the felony of attempting to defeat and evade income taxes in violation of Section 145(b) of the Revenue Act.

Another reason for granting the writ is that the charge to the jury assumes that petitioner received income from a business in excess of that declared and authorized conviction upon such an assumption, without requiring proof beyond a reasonable doubt, that the defendant had taxable income in excess of that declared, and without requiring any

act of commission on the part of the defendant in attempting to defeat and evade income taxes.

Conclusion

WHEREFORE, your petitioner respectfully prays that a writ of certiorari to review the said judgment of the United States Court of Appeals for the Fourth Circuit should be granted.

GEORGE E. ALLEN,
Mutual Building,
Richmond, Virginia,
Attorney for Petitioner.

Dated: March 30, 1949.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinion of the Court

The opinion of the United States Court of Appeals, Fourth Circuit, was filed on the 9th day of March, 1949. Since it has not yet appeared in the published reports, we set it out here in full for the convenience of the Court:

"PER CURIAM:

"This is an appeal from a judgment of conviction, after a trial by jury, in the United States District Court for the Eastern District of Virginia, under an indictment charing the defendant Stinnett with willful attempts to evade individual Federal income taxes for the calendar years 1942, 1943, 1944, in violation of Section 145(b) of the Internal Revenue Code of the United States, 26 U. S. C. A. Section 145(b). Two questions are before us: (1) the sufficiency of the evidence to take the case to the jury; and (2) Whether the Court properly charged the jury.

"Stinnett, during the tax-years in question, was engaged primarily in the second-hand furniture business in Richmond, Virginia, and, for a time, was in the business of furnishing bail bonds. For 1942, the return filed by Stinnett showed a tax liability of $71.13; this tax, as computed by the Government, amounted to $10,041.88. Similar serious discrepancies existed as to the years 1943 and 1944.

"The case of the Government was built largely on the testimony of Special Agent McClanahan. McClanahan arrived at his computation of Stinnett's tax liability primarily by using the total amount of the bank deposits made by Stinnett as his gross receipts, and then allowing Stinnett all deductions claimed by him for the years in question. Thus, for the year 1942, Stin-

nett's bank deposits amounted to $46,753.28, yet he reported gross receipts of only $25,000.00 and a net income of only $1,574.43.

"Even if such a gross discrepancy between bank deposits and gross receipts, without any adequate explanation by the taxpayer, be not sufficient in itself to take the case to the jury (see *Gleckman* v. *United States*, 80 F. (2d) 394, cert. den. 297 U. S. 709), further corroboration was furnished in the evidence. Stinnett admitted that he deposited business receipts in his bank accounts. In each of the years in question, Stinnett purchased United States Savings Bonds in amounts substantially in excess of the net income reported in his returns. And, in 1944, he purchased cashier's checks out of funds not withdrawn from his bank accounts, in amounts far exceeding even the gross receipts reported by him for that year. McClanahan gave detailed testimony as to his examination of Stinnett's bank deposits and checks. There was further testimony of inventory discrepancies.

"Stinnett could offer no adequate explanation of these gross discrepancies and introduced no documentary evidence whatever. The excuse given for Stinnett's failure to produce his books was that these had been destroyed by the purchaser when Stinnett sold his second-hand furniture business. But the purchaser of the business, H. G. Moss, was asked: 'At the time you purchased the defendant's furniture store did you at any time see any records of any nature pertaining to the furniture store?' and replied: 'No, sir, we didn't see anything of any records.' And Special Agent McClanahan testified: 'Q. Did you inquire about any books that Mr. Stinnett may have left there? A. No, I did not because Mr. Stinnett had told me that his books were burned.' Stinnett, when asked what had become of these books, testified: 'I will tell you, Mr Allen: In selling out I don't know what became of the books. I was questioned at the Internal Revenue later about the books but I only had information. I didn't have any information from Mr. and Mrs. Moss that they had

taken them. I only had people working around—grapevine information—that the books had been destroyed.'

"Isolating one sentence of the charge from its context, Stinnett complains of the judge's charge to the jury. This sentence reads:

> " 'If you believe from the evidence, all the evidence before you, considering all the circumstances and facts known to you, that the defendant received income during these respective years in an amount or amounts greater than the amount which he stated in his return as being income, then you shall find him guilty.'

"But this sentence to which objection is made shows clearly that it was not intended as a complete statement in itself of all the elements of the crime charged. Even if the sentence, standing by itself, might be construed as telling the jury that the defendant must be found guilty if, during the respective years, he received income exceeding the amount stated in his returns, any possible ambiguity was immediately cleared up in the succeeding sentences in the same paragraph, which read:

> " 'It is not necessary that the Government prove the precise amount. You may believe that it was less than the amount the Government claims but if you believe that he received an amount greater than the amount which he returned and you further believe that in making out his returns he knew that he was reporting less than the true amount of his income, that he made out the return knowing that and with the purpose of defrauding the Government by making that return, then you shall find him guilty. Unintentional or inadvertent mistakes on the part of the defendant are not sufficient to convict. You must believe that he knew that he intentionally and deliberately filed a return for an amount less than he actually received, and if you believe that with respect to any one of those returns for the years 1942, '43 or '44, you should

find him guilty for such year or years as you believe that he deliberately and intentionally misstated his income.

"'Upon the other hand, unless you are satisfied beyond a reasonable doubt, as I have undertaken to define it, that he intentionally and deliberately misstated the amount of his income in filing these returns, then you should find him guilty.'

"We think there was ample evidence to take the case to the jury and that there was no prejudicial error in the charge to the jury.

"The judgment of the District Court is affirmed.

Affirmed."

II

Jurisdiction

The jurisdiction of this Court is founded upon Section 145(b) of the Revenue Act of 1936, 49 Stat. 1648, 1703, now Section 145(b) of the Internal Revenue Code, 26 U.S.C.A. Internal Revenue Code Section 145(b). The opinion of the Court of Appeals was filed March 9, 1949.

Statement of the Case

(Numerals in parenthesis refer to pages of Reporter's transcript. Numerals with prefix "A" refer to Appellant's appendix in the Court of Appeals, and numerals with the prefix "G" refer to the Government's appendix in the Court of Appeals.)

Petitioner, now fifty years old, grew up in Botetourt County, Virginia. (174). In 1937, he and his wife moved to the City of Richmond, Virginia. (176). They had acquired substantial property holdings in Botetourt County, which they sold before moving to Richmond. (177). When they came to Richmond they brought with them Forty-Seven Thousand Dollars ($47,000.00) in cash, Twenty-Two

Thousand Dollars ($22,000.00) of which belonged to petitioner and Twenty-Five Thousand Dollars ($25,000.00) to his wife. (178). The wife's money was derived from a property settlement upon being divorced from her first husband. (205).

Upon arriving in Richmond, they rented a building and engaged in the business of buying and selling second-hand furniture. Sometimes goods were sold on a commission basis, in which case the commissions only were credited to income. (101).

Petitioner also engaged in the bail-bond business. This business was conducted mostly by means of cashier's checks. He would go to the bank, get a cashier's check for the amount of the bond required, post this with the Clerk of the Court, and when the bond had served its purpose the money was returned to him and redeposited. (179). Sometimes he would cash checks for customers and deposit the checks in bank. (180).

The years covered by the accounts in the indictment, upon which petitioner was convicted, are 1942, 1943, and 1944. (A1, 2, 3, 4).

Late in the Summer of 1942, petitioner's bookkeeper was called into the armed services of the country. In February, 1943, one J. D. Lane undertook the bookkeeping for petitioner. He found all the invoices and bills and opened up a set of three books, (191, 192, 97, 98, 99). He left petitioner in July of 1943 (99) but before leaving he posted everything to date on the three books. (99, 100). One of these books contained all entries of purchases, the other all entries of sales, and the third all expenses incident to the operation of the business.

Petitioner was advised in 1940 by an Internal Revenue Agent to keep such books. (189, 190). When Mr. Lane left, Miss Palmore undertook the bookkeeping. Her duties

were to enter the bills, invoices and sales slips of the day on the books which Mr. Lane had been keeping. She kept the books until January 23, 1945. (120, 121, 122, 123). During the years 1943 and 1944, Miss Palmore totaled the figures in the books at the end of each month. At the end of the year she added up the monthly totals. From these figures the returns for 1943 were made out by one Mrs. Eva Copley (137), and the returns for 1944 by an attorney, Mr. Herman. (37, 125). The 1945 return was filled out by the Honorable Claude M. Dean, Clerk of the United States Court of Appeals, Fourth Circuit. About all, however, that he did was to add up the figures which were taken from the books and papers. A photostatic copy of each of the returns may be seen on pages 54 to 65 of the Appendix to Appellant's brief filed in the Court below.

On January 23, 1945, petitioner was sentenced to jail by a State Court upon a conviction of petit larceny. (183). He had to commence to serve his sentence on the morning of January 24, 1945. He sold his second-hand furniture business for Seventeen Thousand Five Hundred Dollars ($17,500.00) (184) to a Mr. Moss. The judge refused to give him any time to straighten up his business and so he left for jail without getting his books or doing anything except to deliver the stock or merchandise sold. (184).

Glen Jordan, Commissioner of Revenue of the City of Richmond, who interceded for petitioner in an effort to get a little more time for him to straighten up his affairs, said he went to petitioner's place of business and found things "pretty much all upset there, furniture piled all around in a haphazard sort of way * * * all piled up and broken up a lot of furniture." (139, 140, 141). As the result of the rush and conviction, petitioner did not take his books of account from the store and they were lost or destroyed or misplaced. He was never able to see them again.

In 1945, Melvin G. McClanahan, Agent for the Bureau of Internal Revenue, was assigned to investigate petitioner's returns. He was unable to get in touch with him promptly because petitioner was in jail. (A29). When petitioner got out of jail he was ill. (A30). While he was sick he heard that the revenue agents were trying to get in touch with him. As soon as he was able to get out he went to see the revenue agents in company with Mr. Smith, a lawyer, and offered to cooperate fully. (195). He told the agents he was unable to produce his books and why he was unable to do so. During the interview with the revenue agent petitioner told the agent that he deposited monies in bank, giving him the names of the banks. The agent thereupon undertook to determine the tax liability of petitioner solely from his bank deposits. He "simply took his bank deposits" for petitioner's gross receipts. (A32, 33). The agent assumed, without proof, that the sum total of the bank deposits was the sum total of petitioner's receipts from the sale of goods (A33, 34, 38), notwithstanding the agent accepted as correct the figures shown on the returns representing merchandise bought and sold. (A35).

No semblance of an effort was made to determine petitioner's tax liability on the net worth basis; probably because his civil liability would exceed his net worth. (265).

The agent said that—

> "In 1942 we did not eliminate anything. We accepted his bank deposits and I used that as his gross sales plus $3,000.00 that he bought bonds in excess of what he bought from his bank account." (A33).

Government Exhibit No. — shows a withdrawal from the bank of $3,000.00 on the same date that the bond was purchased. Upon cross-examination on the subject of the correctness of the figures taken from petitioner's bank deposits and accepted as gross receipts, the agent said—

"I don't care to answer that in that manner • • • I accepted his bank deposits as they were found." (A34).

His cross-examination concludes:

"Q. So you just assumed that all of the deposits, as we have stated, were receipts from the sale of merchandise? Is that pretty much the procedure you followed in reference to the other returns?

"A. They are all based on the same procedure.

"Q. You followed the same procedure?

"A. Yes, Sir.

"Q. And made the same assumptions and deductions?

"A. That is right."

ARGUMENT

Point I

The conviction is based wholly upon the assumption, without proof, that petitioner's deposits in bank were derived from sales of merchandise and is, therefore, without evidence to support it.

Despite what the Court of Appeals, in its *Per Curiam* opinion said on the subject of the bank deposits being accepted as petitioner's gross receipts, it is respectfully submitted that after all is said and done there is no justification in the record for the conviction unless it can be based wholly on the fact that the aggregate of petitioner's deposits in bank exceed the aggregate of his gross receipts stated in his returns. The Court cites the *Gleckman* Case, 80 Fed. (2d) 394, in support of its opinion. In addition to bank deposits, it was shown that the accused had a business of a lucrative nature. He had also himself made in his return a computation of all of his bank deposits that he claimed were from the proceeds of his business. It was further shown that his net worth had increased con-

siderably. A comparison of his net worth statements showed omissions in the first statement of property included in the second, and substantially different valuations were made of the same properties. The Court said:

> "The bank deposits for large items of receipts by Gleckman do not, therefore, stand entirely alone as the sole proof of the existence of a tax due from him, but they are identified with business carried on by him and so are sufficiently shown to be of a taxable nature."

There was no evidence in the instant case that petitioner was engaged in a business of a lucrative nature. The evidence conclusively shows that he was in business only a few years and that the gross proceeds of the sale of the business when he closed it out in January, 1945, amounted to only Seventeen Thousand Five Hundred Dollars ($17,500.00). That was much less money than he and his wife brought with them to Richmond. In the *Gleckman* case it was said that there was substantial evidence that the defendant had a business outside of that described in his return and that at least some of his deposits were derived from it. There was no such evidence in this case, nor was there any evidence that the defendant made in his return a computation of bank deposits made during the year from his business. Nor was there any evidence that the defendant's net worth was increased. The evidence in fact was to the contrary. The Government asked for a prison sentence because the defendant's net worth was not sufficient to pay his tax liability. There is no identification of the deposits with the defendant's business except the statement that the defendant is said to have made to McClanahan, as follows:

> "Since Mr. Stinnett had stated to us in his interview that he had deposited his receipts, I found that he was making periodic deposits, that he had no records what-

ever from which to make an examination and we determined his tax liability from the bank receipts and cash disbursements. * * * As he said because he had no books for examination and he had stated that he deposited the receipts and we found that he was making periodic deposits. We determined that was the way to arrive at his taxable income and that was the reason we were making the analysis." (50)

In addition to referring to the foregoing statement of petitioner, the Court of Appeals says that in each of the years in question petitioner purchased United States Savings Bonds in amounts substantially in excess of the net income reported in his returns. Is that any proof that the bonds were purchased with unreported income? May they not just as well have been purchased, as petitioner and his wife testified, with funds which they had when they came to Richmond; indeed largely with funds which belonged to the wife. The Court of Appeals says that corroboration is also furnished in the testimony with reference to the purchase of cashier's checks out of funds not withdrawn from his bank account far in excess of the gross receipts reported by petitioner. The cashier's checks were purchased in connection with the bail-bond business. They prove nothing so far as income is concerned. The same amount of money was used time and again in purchasing cashier's checks.

The testimony with reference to inventory discrepancies, referred to by the Court, is of little weight. The only discrepancy which appears upon the face of the three returns in question is the difference between the year-end inventory of 1943 and the beginning inventory on the return for 1944. The inventory for the end of 1943 was stated as Ten Thousand Dollars ($10,000.00), and the inventory for the beginning of 1944 was stated as Twelve Thousand Nine Hundred Eighty-One Dollars ($12,981.00). Conced-

edly, these figures should have been the same. Petitioner could not explain how they came to differ. Mrs. Copley made out the 1943 return and Mr. Herman, a lawyer, made out the 1944 return, with a copy of the 1943 return before him. (A59, year-end inventory, 1943; A64, inventory beginning of the year 1944).

It is respectfully submitted that the conviction is without evidence to support it. There is not a scintilla of evidence that petitioner's net worth was increased during the period covered by his returns. Indeed the admission of the District Attorney (265) is that—

> "The defendant's civil liability would exceed his present net worth."

There is no contradiction in the evidence that petitioner had more money when he came to Richmond and went into the second-hand furniture business than he did when he sold out his business in January of 1945 just before going to prison. There is not a scintilla of evidence that his business was "of a lucrative nature." There is no evidence of any concealment of any assets of any kind. There is no evidence of any lack of cooperation of the petitioner with the agents of the Bureau when they commenced to investigate petitioner's returns. He was in jail when they first started their investigation; he was sick immediately following his release from prison; as soon as he heard the agents wanted to see him, he went to see them. There is no proof of any taxable income in excess of that declared in petitioner's returns. The conviction is based solely on the assumption that petitioner's bank deposits were the proceeds of the sale of merchandise. There is no evidence that he had any other business, except the bail-bond business, and the evidence shows he lost money at that. No proper hypothetical questions were propounded to any Government experts, such as was done in the *Gleckman* case, to

which an answer could be properly made, based upon the assumption of the necessary facts embraced in the hypothetical question. The computations of so-called experts were not based upon substantially the entire evidence, as was the case in *United States* v. *Johnson*, 319 U. S. 503, 63 Supreme Court Reporter 1233. Nor was there any instruction given on the weight to be accorded the testimony of the so-called experts, as was done in *Cane* v. *United States*, 159 Fed. (2d) 464. The testimony was, therefore, insufficient to establish, beyond a reasonable doubt, the charge that there was a tax due from the petitioner and that he wilfully attempted to evade it.

In *Spies* v. *United States*, 317 U. S. 492, 63 Sup. Ct. Reporter 364, this Court dealt with the nature of the offense of attempting to defeat and evade income taxes and the degree of proof required to establish the charge beyond a reasonable doubt. It is there shown that in order to convict one of the felony of wilfully attempting to evade or defeat income taxes some *wilful commission* must be proven in addition to the wilful omissions that make up the list of misdemeanors. Said the Court:

> "We think • • • Congress intended some wilful commission in addition to the wilful omissions that make up the list of misdemeanors. Wilful but passive neglect of the statutory duty may constitute the lesser offense, but to combine with it a wilful and positive attempt to evade tax in any manner or to defeat it by any means lifts the offense, to the degree of felony."

What "wilful commission," or "wilful and positive attempt," may I ask, was petitioner guilty of in this case? Let us first eliminate the acts referred to in the charge and from which the Court in the *Spies* case thought "affirmative and wilful attempt" might be inferred.

There is certainly no evidence that the defendant kept a double set of books. There is positive evidence, which is not

denied, that he kept three books—one in which he listed his purchases; one his sales, and the other, his expenses. There is no evidence that he made any false entries or alterations, nor is there any evidence that he made any false invoices or documents. There is no evidence that he destroyed any books or records. True, it is, his books disappeared, but he said they did not disappear until after he left for prison, and this is not contradicted. It is established, without contradiction, that he sought a postponement of his sentence in order to give him time to wind up his business, but Judge Ingram, of the Criminal Court, refused to grant such a postponement. This testimony of petitioner was supported by Glen Jordan, Insurance Agent and Commissioner of Revenue of the City. The fact that proper books were kept was proven by the testimony of Lane, the man who opened up the books and kept them for a while before they disappeared. The bookkeeper who followed Lane testified that she made up statements from the books and delivered them to the persons who made out the returns. There is no denial of any of this testimony. It is supported by the Honorable Claude M. Dean, Clerk of this Court, who added the figures in one of the returns, the testimony of Mrs. Copley, who made out another, and the testimony of Mr. Herman, who made out the third return. There was certainly no evidence of the concealment of assets. The only matter in controversy was the amount of appellant's gross sales. A statement of them is shown in his returns, made up from statements from the lost books before they were lost.

We repeat that the only conduct relied upon to show a "wilful commission" or a "wilful and positive attempt" is the omission of the appellant to include in his gross receipts from sales certain bank deposits which the Bureau Agent assumed, without proof, were the proceeds of sales.

He said he made this assumption upon the basis of a statement made to him by appellant that appellant deposited his receipts in the bank. If, per chance by a close analysis, deposits in excess of the amounts reported as gross receipts may be classified as such, this would be but an omission classed as "wilful but passive neglect of the statutory duty" to report all income. Certainly in the absence of proof by the Government that appellant actually had income in excess of that declared, a conviction based upon such assumption cannot stand.

For an instructive case on the subject of a gross understatement of gross sales in a return, see the case of *Barrow* v. *United States*, 171 Fed. (2d) 286. In that case it was shown that the defendant knew of the gross understatement, he having made the return after he was advised that he was largely understating his gross sales. In the instant case petitioner testified positively that his gross sales were correctly stated and there is no proof that they were not correctly stated. The testimony of the revenue agent to that effect was based merely upon the assumption that the bank deposits were receipts from sales.

Point II

The charge assumes that petitioner received income in excess of that declared, and authorizes a conviction upon such an assumption without requiring proof beyond a reasonable doubt that petitioner had taxable income in excess of that declared and without requiring any act of commission on the part of petitioner in attempting to defeat and evade income taxes.

After charging the jury generally upon the facts; the presumption of innocence and the requirement of proof beyond a reasonable doubt, etc., the Court said:

"Coming to the case which you have before you, as I before stated, the gist of the charge or the offense with which this defendant is charged is willfully and fraudulently attempting to escape or evade the payment of income tax. The evidence before you consists of testimony and other evidence concerning monies received by the defendant, monies which were in his possession during the years involved. It is the contention of the Government that these monies, or a great part of them, represent taxable income by the defendant. I think, Gentlemen, that the issue is a narrow one and clear-cut.

"If you believe from the evidence, all the evidence before you, considering all the circumstances and facts known to you, that the defendant received income during these respective years in an amount or amounts greater than the amount which he stated in his return as being income, then you shall find him guilty. It is not necessary that the Government prove the precise amount."

It will be readily conceded that so much of the charge as we have quoted is incorrect. It would be incorrect even in a civil case.

Immediately following the above quotation is this language:

"You may believe that it was less than the amount the Government claims but if you believe that he received an amount greater than the amount which he returned and you further believe that in making out his returns he knew that he was reporting less than the true amount of his income, that he made out the return knowing that and with the purpose of defrauding the Government by making that return, then you shall find him guilty. Unintentional or inadvertent mistakes on the part of the defendant are not sufficient to convict. You must believe that he knew that he intentionally and deliberately filed a return for an amount less than he actually received, and if you believe that with

respect to any one of those returns for the years 1942, '43 or '44, you should find him guilty for such year or years as you believe that he deliberately and intentionally misstated his income."

It will be noted that throughout the language last above quoted, the charge assumes that the appellant received income in excess of that declared.

Following the paragraph last quoted from is a separate paragraph which reads:

> "Upon the other hand, unless you are satisfied beyond a reasonable doubt, as I have undertaken to define it, that he intentionally and deliberately misstated the amount of his income in filing these returns, then you should find him not guilty."

Again it is assumed that the appellant misstated the amount of his income.

Near the bottom of page 45 of the appendix, in connection with the use of the term "willfully and knowingly," the jury is told that these words mean that "in the filing of the return the defendant must have been guilty of some affirmative act. Filing the return is an affirmative act, accompanied by some element of evil motive and want of justification in view of all the circumstances."

Again the Court assumes that a return has been filed in which the appellant has stated his taxable income at a sum less than it actually was. The same assumption is found throughout the rest of the charge. Moreover, the jury is told that "Filing the return is an affirmative act, accompanied by some element of evil motive and want of justification in view of all the circumstances." This is not sufficient to require proof of fraud in connection with the "commission of a willful act" or a "willful and positive attempt." "Of course, you can't look into a man's mind

and know what he was thinking," said the Court, "you have to consider his course of conduct and all the facts in the case and then arrive at such verdict as in your good judgment you believe is proper." Here, again, the charge fails in connection with the burden of proof, beyond a reasonable doubt, of a "willful act of commission" or a "willful and positive attempt" to evade the tax.

Nowhere in the charge is the jury told that the Government must first establish, beyond a reasonable doubt, as laid down in the *Spies* case, that the petitioner actually had taxable income in excess of that declared. The facts relied upon by the Government to establish guilt were of such a nature as to make it essential to a fair trial that the jury be instructed clearly on this point. The petitioner was entitled to have the jury told, as indicated in the objections to the charge, that they could not find petitioner guilty of willful attempt to defeat and evade the tax if they should find only that he failed to make a correct return, or that he incorrectly stated his inventory carried over from 1943 to 1944, or that his bank deposits alone amounted to more than his total receipts as given in his returns.

In the late Virginia case of *Gary* v. *Artist*, 43 S. E. (2d), 933, the Court held that positive wrong in one instruction is not cured by a correct statement of the law in another. We quote:

> "All error is presumed to be prejudicial and where conflicting or inconsistent instructions are given, the court is without the psychic power to say which influenced the jury. *Norfolk Railway Co.* v. *Higgins*, 108 Va. 324, 332, 61 S. E. 766."

In conclusion, it should be noted that the Court was at length in charging the jury upon the general principals of the presumption of innocence, reasonable doubt and the

credibility of witnesses. Then, immediately before coming to the case in hand, the Court said:

> "Gentlemen, those general principals of law apply in this case and in all cases involving the violation or alleged violation of the penal statutes."

The Court then prefaced the part of the charge which we objected to with this language:

"Coming to the case which you have before you" as if to say the principles announced as applicable generally to criminal cases were somewhat relaxed in this case. Then follows the incorrect statements of law and the assumptions with reference to the failure of petitioner to report all of his taxable income.

In *Nicola* v. *United States*, 72 Fed. (2d) 780 (CA3), the Court said:

> "Where two instructions are given to the jury, one erroneous and prejudicial and the other correct, it is impossible to tell which one the jury followed and it constitutes reversible error. When an erroneous instruction has been given, it is not cured by a subsequent correct one, unless the former is withdrawn."

The case of *Mills* v. *United States*, 164 U. S. 644, 17 Sup. Ct. Reporter, 210, is cited in support of the text. In that case, Mr. Justice Peckham, speaking for the Court, said:

> "Although it may be claimed that other portions of the charge of the learned court stated correctly the law with reference to this particular case, yet we cannot escape the fear that the error above pointed out may have found lodgment in the minds of the jury. Where the evidence of the commission of the crime itself impresses us as being somewhat unsatisfactory, and in a case where the life of the defendant is at stake, we feel that it is impossible to permit him to be executed in consequence of a conviction by a jury

under a charge of the court which, we think, in some of its features, was clearly erroneous in law, because not full enough on the subject herein discussed, even though in some parts of the charge a more full and correct statement of the law was given. Which of the two statements was received and acted upon by the jury it is wholly impossible for this court to determine; and, as one of them was erroneous in not more fully and definitely stating what was the character of the nonconsent which rendered the mere amount of force incident to the performance of the act itself sufficient to constitute the crime, the judgment of death must be reversed, and the defendant subjected to another trial, where the rules of law applicable to the case shall be correctly and fully stated to the jury."

Conclusion

It is respectfully submitted that the charge was erroneous in the particulars complained of, and that the judgment is without evidence to support it.

Respectfully submitted,

GEO. E. ALLEN,
(ALLEN, ALLEN, & ALLEN)
611 Mutual Building,
Richmond, Virginia,
Counsel for Petitioner.